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Supreme Court, U.S.
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08116 MAY 9 - 2008

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No.

IN THE

Supreme Court of the United States

COURTNEY MANBECK, et al.

Petitioners,

v.

KATONAH-LEWISBORO SCHOOL DISTRICT, ROBERT LICHTENFIELD, JAMES MILLIHAN,

Respondents,

On Petition For Writ of Certiorari To The United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of New York has been financing the cost of kindergarten education for a population of 16.4 million people living in the New York City area and Yonkers City. It has, however, denied the 2.6 million residents living outside New York City and Yonkers the same access to kindergarten education. Indeed, the State paid almost 9 billions of dollars in subsidies to the two largest school districts of the state with the highest number of minority students, New York City's and the City of Yonkers', both of which have over 55,000 kindergarten minority students and admit into kindergarten all December-born students. However, the State does not provide any subsidy for but has authorized school districts outside of New York City and Yonkers, such as the Katonah-Lewisboro school district, which is 98 percent white and which has about 250 kindergarten students in any particular year, to deny petitioner and all potential students born in December a public kindergarten education as well as public transportation to a private kindergarten institution pursuant to Sections 3202 and 3635 of New York Education Law. The district court held that petitioner, who was born in December and who was denied a public school education, did not have a property interest in kindergarten education - unlike kindergartners in New York City and the City of Yonkers - and

could not invoke Due Process and Equal Protection claims. In affirming the district court's denial, the Second Circuit's decision directly conflicts with the decisions of other circuits as well as recent decisions of this Court proscribing discrimination in the educational context on the basis of racial classification.

Three questions are presented:

1. Can a State create a property interest by financing kindergarten education for December-born children for the vast majority of children in the state, who live in the school districts having over sixty percent of minority students, in this case the New York City School District and the Yonkers City School District, and that such property interest is recognized as being subject to protection by the Fourteenth Amendment of the United States Constitution?

2. Is a state statute, providing for the exclusion from kindergarten admission by local school district on the basis of the student being born in December, which has been determined to result in condemning the student to suffer a postponement of one year of education, subject to the procedural protections required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

3. Does the application of a facially-neutral

statute in a racially-based manner violate the Due Process and Equal Protection rights of public students affected by the jurisprudence of Parents Involved In Community Schools v. Seattle School Dist. No. 1, 127 S.Ct. 2738 (2007), Goss v. Lopez, 419 U.S. 565 (1975) and Shapiro v. Thompson, 394 U.S. 618 (1969)?

PARTIES TO THE PROCEEDING

In addition to the parties in the caption, Alexandra T. Manbeck, a parent of Courtney Manbeck, is the petitioner, and the following individuals were named as defendants in all the proceedings below: Robert Lichtenfield, in his capacity as School District Superintendent; James Millihan, in his capacity as Transportation Director.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Courtney Manbeck, by and through her mother, Alexandra T. Manbeck, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The initial opinion herein was that of the district court, reported at 437 F.Supp.2d 273 (S.D.N.Y. 2006) and attached at App. 6a-21a. On appeal to the Court of Appeals for the Ninth Circuit, the three-judge panel rendered an unreported opinion available at 2008 WL 376385 and attached at App. 1a-5a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on February 11, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part: "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." **U.S. Const., amend. XIV, § 1**.

42 U.S.C. § 2000d provides in relevant part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

New York Education Law:

§ 3202. Public schools free to resident pupils...

1. A person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition...**Nothing herein**

contained shall, however, require a board of education to admit a child who becomes five years of age after the school year has commenced unless his birthday occurs on or before the first of December.

§ 3635. Transportation

1.a. Sufficient transportation facilities (including the operation and maintenance of motor vehicles) shall be provided by the school district for all the children residing within the school district to and from the school they legally attend, who are in need of such transportation because of the remoteness of the school to the child or for the promotion of the best interest of such children. **Such transportation shall be provided for all children attending grades kindergarten through eight who live more than two miles from the school which they legally attend** and for all children attending grades nine through twelve who live more than three miles from the school which they legally attend and shall be provided for each such child up to a distance of fifteen miles, the distances in each case being measured by the nearest available route from home to school.

STATEMENT OF THE CASE

This case presents an opportunity to clarify for lower courts and school districts across the state and the country how the Due Process and Equal Protection rights of public kindergarten students are affected by the landmark decisions in Parents Involved In Community Schools v. Seattle School Dist. No. 1, 127 S.Ct. 2738 (2007), Goss v. Lopez, 419 U.S. 565 (1975) and Shapiro v. Thompson, 394 U.S. 618 (1969). The case also presents an opportunity to resolve the split among the circuits over whether the Equal Protection Clause allows the states to burden public school admission and to deny public transportation on the basis of race.

A class action was brought by petitioner on behalf of public school system students to review their exclusion from kindergarten admission without hearing under authority of a New York statute permitting exclusion of students for a period of one-year because they happen to be born in December of a particular year and live in districts outside New York City and Yonkers. The complaint sought a declaration that the New York statute was unconstitutional in that it permitted the Katonah-Lewisboro School District to deprive petitioners of their rights to kindergarten education without a hearing of any kind, in violation of the procedural due process component of the Fourteenth Amendment. It also sought to

enjoin the public school officials from denying them public transportation concomittant with public education. The district court held that there is no property interest in a kindergarten education for children living outside of New York City and Yonkers and held that petitioner had no Due Process or Equal Protection claims for the deprivation of kindergarten admission. The Court of Appeals affirmed.

FACTUAL AND LEGAL BACKGROUND

Although this is a class action challenging an institutional practice embodied in a law and a regulation, it is thought useful to outline briefly the facts surrounding the application of this law and how it discriminates against all children living outside of New York City and Yonkers.

A- STATE OF NEW YORK'S RACE-BASED APPLICATION OF THE STATUTE

The State of New York subsidizes the public education of all kindergarten students in New York City and Yonkers, which have a total of 16.4 million residents out of a state population of 19 million. In effect, the remaining 2.6 million residents do not receive any state aid for schooling their children. The New York City school district and the Yonkers school districts are the two largest school districts of the state

and have a kindergarten class of about 55,000 students. http://schools.nyc.gov/AboutUs/DOEData/Stats/default.htm; http://yonkerspublicschool.org/budget/. In the year 2007-2008, the state provided $208 million in subsidies to the Yonkers school system and $8 billion to the New York City school system. *See* http://www.nyccnet.edu/offices/d%5Fchanc%5Foper/budget/exp01/y2004_2005/function.asp; http://schools.nyc.gov/offices/d_chanc_oper/budget/dbor/fsr/September/pdf/09Cover/pdf. New York City and Yonkers school systems have a non-white kindergarten student body of over 60 percent and admit all students born in December in their December class. *Id.* At the same time that the state is subsidizing education for the New York City and the City of Yonkers kindergarten class, the state discriminates against children in other school districts by allowing those districts to exclude December-born children from their kindergarten class. The State provides no money whatsoever for the Katonah-Lewisboro school district, unlike the City of New York's and Yonkers' systems.

Indeed, the State is subsidizing kindergarten education for a population of 16.2 million state residents of New York City and the 200,000 residents of Yonkers, while denying the remaining 2.5 million residents who live out of New York City and Yonkers the right to kindergarten education if they happen to be born

in December of a particular admission year. *See* http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US36&-ds_name=DEC_2000_SF1_U&-_lang=en&-redoLog=false&-mt_name=DEC_2000_SF1_U_GCTP6_ST7&-format=ST-7&-CONTEXT=gct (The State of New York has a total population of 18.9 million people according to the 2000 Census).

B- NEW YORK EDUCATION LAW § 3202

In contrast to the New York City School System and the City of Yonkers School District, the Katonah-Lewisboro School District (hereinafter "School District"), whose population numbered 12,000 and which has only 250 kindergarten students compared to the 55,000 kindergarten students of New York City and Yonkers, whose population numbers 16.4 million, denied petitioner Courtney Manbeck (and all other similarly situated children) entrance to the public school kindergarten for the 2005-2006 academic year because, having been born on December 11, 2000, she did not become five years of age on or before December 1, 2005 as required by the admission policy of the School District pursuant to New York Education Law § 3202. However, aside from the New York City School System and the City of Yonkers School District, non-public, private schools admit children born in December 2000. Once Courtney

Manbeck became enrolled in a non-public school kindergarten, the School District denied her public transportation, claiming that she was not "legally attending" school. Courtney filed a lawsuit in Federal District Court contending that the School District's policy of denying all children born in December of a particular year both public education and transportation violates their rights to Due Process and Equal Protection under the Fourteenth Amendment to the United States Constitution since the State pays for kindergarten education for all December-born students in the largest public school systems in the State, the New York City public school system and the Yonkers public school system with their 55,000 kindergarten students. The official website of the New York City public school system sets forth the following information regarding kindergarten admission:

Who is eligible to register for public school?

Registration is for children who are:

1) New to the New York City public school system

2) Returning to the New York City public school system

Students between the age of 5 and 21 residing in New York City - who have not graduated from high school - are eligible to attend one of the City's schools free of cost. Although Kindergarten isn't mandatory in NYC Schools, **a child must**

be age 5 by December 31 of the year he/she will enroll in kindergarten. *See* www.nycenet.edu/Offices/StudentEnroll/general/general.htm, (emphasis added).

Given that the State has been directly financing kindergarten admission for New York City and the City of Yonkers, which have over sixty percent minority students and a kindergarten class of 55,000 pupils, the State has created a property interest in kindergarten education for all December-born kindergarten age children. Any child who does not attend the New York City or the City of Yonkers school system is subject to exclusion from kindergarten admission if he or she happens to be born in December .

C- THE PUBLIC KINDERGARTEN MARKET PLACE

Like the New York City public school system and the Yonkers School District, the economic marketplace has set December 31 as the cutoff date for admission into kindergarten. The impact of the State-censored policy is borne by a subclass of children who live outside New York City and Yonkers and whose parents cannot afford private tuition and transportation, since the private marketplace, like the New York City public school systems and the districts of

Yonkers, admits children who turn five by December 31 of the year they are enrolled in their kindergarten.

Although petitioner Courtney Manbeck was denied a public kindergarten education, she was admitted in the kindergarten class of the private Melrose School. Melrose, which like other New York private schools within 15 miles of plaintiff's home, uses a December 31 cutoff date. Once Courtney had finished private kindergarten in June 2006, she became eligible to attend public first-grade school. In effect, by fully subsidizing kindergarten education for all 55,000 students in the City of New York and Yonkers, the State cannot claim that there is no legitimate property interest in a kindergarten education for the students living outside of New York City and Yonkers. This is especially true in view of the fact that the economic marketplace has challenged the policy set by the State by offering a competitive solution to a subclass of kindergarten students whose parents are able to afford both education and transportation, such as petitioner Courtney Manbeck. Those children who are denied a public kindergarten education can always get admitted into a private kindergarten class and transfer into first grade in the public school system. Although the State Commissioner of Education did try in 1958 to adopt administrative regulations that would have prohibited private schools from admitting

kindergartners born after the cutoff date of the local school district, affected private schools managed to secure a state court ruling with forbids the New York Department of Education and its local districts from denying first grade admission (in the public schools) to kindergartners who attended private school kindergarten but were not old enough to attend public school kindergarten. *See* Jokinen v. Allen, 182 N.Y.S.2d 166, 15 Misc.2d 124 (Special Term 1958)(the local districts must admit into first grade a child of five years and eight months if he has attended a nonpublic kindergarten, even though the school is unregistered).

Since the private sector has received the blessing of the state judiciary which held that public schools must admit into first grade any kindergartners from an unregistered or registered school, subsequent regulations issued by the Commissioner concerning the voluntary registration of private schools have no effect on the unregistered private sector's kindergarten business. N.Y. Comp. Codes R. & Regs. Tit. 8, §§ 125.1 *et seq.*, which are the Commissioner's regulations regarding voluntary registration of nonpublic nursery schools and kindergartens, states in relevant part as follows:

OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK TITLE 8. EDUCATION DEPARTMENT CHAPTER II.

REGULATIONS OF THE COMMISSIONER
SUBCHAPTER F. PRIVATE SCHOOLS

PART 125. VOLUNTARY REGISTRATION OF NONPUBLIC NURSERY SCHOOLS AND KINDERGARTENS

Section 125.9 Admission to kindergarten.

A kindergarten shall not admit a child who is younger than the age of entrance into the public schools established by the school district in which that child resides.

Although the State Commissioner of Education issued regulations concerning voluntary registration of private schools, these regulations are in practice irrelevant since the case Jokinen v. Allen permits the private sector to offer a market alternative to the local district's cutoff date. The end result is that although the School District's policy discriminates against all children outside of New York City and Yonkers who turn five during the month of December of the year they are enrolled in kindergarten, the impact of such policy is borne primarily by the subclass of children whose parents cannot afford private tuition and transportation. *See* Merrill, The Landscape of Constitutional Property, 86 Va. L.Rev. 885, 964, n. 289 (2000) (remarking,

with regard to the property interest recognized in *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), that "any parent who has contemplated sending their children to private schools knows that public schooling has a monetary value"). .

REASONS FOR GRANTING THE PETITION

Although the Court of Appeals purported to apply Goss v. Lopez to hold that New York law on its face does not provide that kindergarten education for December-born children is a protected interest, the Court of Appeals failed to consider the unequal application of the statute which results in discrimination of petitioners on the basis of their race. In the 2005-06 school year, the School District denied over 25 December-born kindergarten admission because they lived in the predominantly white district outside of New York City and Yonkers, whereas some 4,000 December-born students were admitted into kindergarten in New York City and Yonkers.

The uneven application of the New York statute results in race-based admissions which impose significant burdens on affected families living outside of Yonkers and New York City: (1) denial of admission to kindergarten; (2) imposition of burden on parents to provide for pre-school

education for a year prior to kindergarten admission and for transportation even if they enrolled their children in private education and (3) denial of kindergarten education would stunt petitioners' intellectual and emotional development and effectively amounts to a demotion from kindergarten to preschool grade. As the Second Circuit stated in Gant v. Wallingford Board of Education, 69 F.3d 669, 678 (2d Cir. 1995), "[d]emotion, even at this rudimentary stage of education, may permanently delay the student's ultimate academic goals."

The burden is even more onerous since the New York City and Yonkers offer public pre-kindergarten education to children free of charge whereas children living outside of those two areas are not afforded public pre-kindergarten education. Not only would financial limitations would prohibit the great majority of petitioners from seeking a private kindergarten education, petitioners would also be deprived of a public pre-kindergarten education.

I- THE COURT OF APPEALS WRONGFULLY HELD THAT KINDERGARTEN EDUCATION IS NOT A PROTECTED INTEREST WITHIN THE MEANING OF THE DUE PROCESS CLAUSE

The Court of Appeals held that because there is no constitutional right to a kindergarten

education at public expense, the Due Process Clause does not protect against exclusion from the public school system for December-born students in districts other than the New York City and Yonkers school districts, even though such education is made available to all New York City and Yonkers' 16.4 million residents. Having chosen to extend the right to kindergarten education to people of petitioner's class generally, *i.e.*, 16.4 million residents out of 19 million residents, New York may not claim in good faith that the remaining 2.6 million residents could be denied such right absent fundamentally fair procedures to determine whether such denial is justified.

In ***Board of Regents of State College v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972)**, this Court ruled that one must have a "liberty" interest or a "property" interest in order to invoke Due Process protection. Both reason and this Court's precedents support a holding that kindergarten admission in New York for December-born children satisfies the criterion for each of these interests.

In ***Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694 (1954)**, this Court again held that education was a liberty subject to Due Process protection. Moreover, this Court affirmed this important principle in *Roth*, when it quoted approvingly the above-stated definition of liberty from Meyer v. Nebraska, 262 U.S. 399, 43 S.Ct.

625 (1923). In Goss v. Lopez, 419 U.S. 565 (1975) this Court reiterated that education is a fundamental interest within the meaning of the Due Process Clause. Thus this Court has been consistent in following its acknowledgment in Goss that the "liberty" of the Due Process Clause, at the very least, includes the right to education.

Given that the State has extended such "liberty" or "property" interest to 16.4 million citizens, the State has created a property interest in education and cannot claim that such interest can be denied at the whim of individual school districts.

II- IN CONFERRING THE RIGHT TO KINDERGARTEN EDUCATION TO 16.4 MILLION RESIDENTS OUT OF THE 19 MILLION STATE RESIDENTS, THE STATE HAS CREATED A PROPERTY AND A LIBERTY INTEREST IN EDUCATION

The State of New York has a total of 19 million residents, based on the 2000 Census. About 16.4 million residents live in New York City and in Yonkers. The State provides 9.2 billion dollars in subsidies to the New York City and Yonkers systems and direct local authorities to provide a free education to all residents between five and 21 years of age. N.Y. Ed. § 3202. Although it is true that of the Code permits school districts to deny

students kindergarten admission because they turn five during the month of December of the admission year, the state has preferentially subsidized admission for the vast majority of such students in New York City and Yonkers while at the same time allowing school districts outside of New York City and Yonkers to deny petitioners the right to kindergarten admission. Given that the State has been subsidizing kindergarten admission to 16.4 million New York City and Yonkers residents out of the 19 million state-wide residents, the State has created a right to kindergarten admission which must be considered to be a "property," as well as a "liberty," interest, subject to Due Process Protection pursuant to Goss v. Lopez. Having chosen to extend the right to kindergarten education to people of appellants' class generally, New York has conferred a property interest and may not withdraw that right on the whim of individual school districts absent fundamentally fair procedures to determine whether the denial is justified.

III- ON THE BASIS OF STATE LAW, PETITIONERS HAVE LEGITIMATE CLAIMS TO KINDERGARTEN EDUCATION. THERE IS SEVERE HARM IN BEING DEMOTED TO PRE-KINDERGARTEN TRIGGERING DUE PROCESS PROTECTIONS

This Court has defined liberty and property

interests by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus the welfare recipients in Shapiro v. Thompson, 394 U.S. 618 (1969), had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them and could not be denied benefits for the first year of arrival in the state.

Similarly, there is a certainty that substantial harm will result whenever a child is excluded for one year from this important interest of receiving a kindergarten education. The obvious loss through deprivation of education coupled with the substantial probability of collateral consequences meets that quantum of harm required to invoke the Due Process clause enunciated in Goss v. Lopez and Shapiro v. Thompson.

The New York Education statute operates in the School District to deny non-minority children kindergarten admission solely because they live outside New York City and Yonkers. Because Equal Protection rights are individual, personal rights, *e.g.*, in Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("the Fourteenth Amendment 'protect[s] *persons*, not *groups*' ") (emphasis in original, quoting and Adarand Constructors Inc., v. Pena,

515 U.S. 200, 227 (1995), each student affected by the New York statute suffers injury, an infringement of her personal right to be free from race-based decision-making by government and the denial of an otherwise generally available benefit - admission to kindergarten - solely because of her race.

IV. THE COURT OF APPEALS INCORRECTLY HELD THAT COURTS SHOULD DEFER TO THE LEGISLATURE AND LOCAL SCHOOL DISTRICTS

The court inappropriately deferred to the local School District without considering the state's preferential treatment of the New York City School District and Yonkers School District and presumed that the age cut-off of December 1 was justified "to establish classifications that roughly approximate the nature of the problem perceived." The District asserts, and the court of appeals accepts that the classification is related to "the nature of the problem perceived", i.e., the young age of petitioners make them too immature and unqualified for kindergarten admission, without considering that the State did not deem such problem to exist in the tens of thousands of students in New York City and in Yonkers. The State's subsidy of kindergarten admission in those places establishes (1) a state-sponsored property

and liberty interest in kindergarten education, and (2) a *de facto* racial classification based on the selective and preferential application of the New York statute in New York City and in Yonkers. Both the New York City and Yonkers student body is composed of over sixty percent of minority students. Such *de facto* racial classification is proscribed by this Court in the recent case of Parents Involved In Community Schools v. Seattle School Dist. No. 1, 127 S.Ct. 2738 (2007).

In accepting the School District's claim that petitioner Courtney was denied kindergarten admission due to the "nature of the problem perceived" and in refusing to consider the State's preferential treatment of the two largest school districts of the State, the court of appeals allowed the State's application of the statute to result in *de facto* racial classification. Accepting the School District's claim, the court of appeals allowed the school districts complete discretion by which children are granted or denied kindergarten admission according to whether or not they lived in New York City or Yonkers. Aside from the fact that outside of New York City and Yonkers kindergarten admission is subject to the whims of individual school districts, the State's subsidies creates a *de facto* classification based solely on race.

V. THIS COURT HAS PROSCRIBED SELECTIVE AND PREFERENTIAL TREATMENT OF STUDENTS ON THE BASIS OF RACE

While the due process clause of the Fourteenth Amendment has been interpreted to apply to a 10-days suspension from public school, Goss v. Lopez, this Court has never addressed the issue whether the equal protection clause is likewise applicable. Both the language and import of the two clauses fundamentally differ. See, Mathews v. Diaz, 426 U.S. 67, 68 (1976). Whereas the due process clause provides procedural protection for whatever rights a person might otherwise possess, the equal protection clause guarantees equal rights to "government benefit[s]."

There is no dispute that the effect of the waiting-period requirement in petitioner's case is to create two classes of resident families indistinguishable from each other except that one is composed of residents who resided in New York City or Yonkers, and the second of residents who resided outside of those jurisdictions. On the basis of this sole difference the first class is granted unconditional admission to kindergarten and the second class is denied admission for another year. The statutory denial of admission to December-born students creates a classification which constitutes an invidious discrimination denying them equal protection of the laws and conflicts

with this Court's holding in Shapiro v. Thompson. The government's interest - denial of kindergarten education to December born students to save local districts money - is promoted by classification which either may not constitutionally be promoted by government or are not compelling governmental interests. The School District justified the one-year waiting-period requirement as a protective device to preserve the fiscal integrity of state public school districts without mentioning that massive state funds have been granted to New York City and Yonkers' school districts, both of which admit all December-born students in kindergarten, thereby making kindergarten admission a state-sponsored property and liberty interest.

The ramifications of the Second Circuit's decision about whether states may, consistent with the Equal Protection Clause, engage in preferential and selective treatment resulting in racial discrimination, are significant. Left undisturbed, the states may confer huge financial subsidies to ensure school admission to a selected majority of its citizens - 16.4 million people - and yet allow a substantially white minority - 2.4 million - to be denied the same privilege, creating a *de facto* discrimination on the basis of race. Accordingly, this case is an excellent vehicle for this Court to clarify the application of Goss, Shapiro, and Parents Involved In Community Schools v. Seattle School Dist. No. 1 to elementary public schools and to confirm that these cases are

not a license to ignore the long line of Due Process and Equal Protection cases decided by this Court that expressly and repeatedly condemn selective treatment and racial classification as unconstitutional.

VI- THERE IS A SPLIT AMONG THE CIRCUITS OVER WHETHER DEPRIVATION OF PUBLIC TRANSPORTATION VIOLATES THE EQUAL PROTECTION CLAUSE

Clearly, it is well-established that access to education and transportation to and from school is a constitutional right pursuant to the Supreme Court's precedent, as follows:

> We must point out that busing as a constitutional right is not an issue in this case...Segregated schools violate the pupils' right to equal protection of the law. When that right is violated, students may ask the federal district court for relief that will restore students' constitutional rights in a manner appropriate to the school system...

Swann v. Charlotte-Meckleburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 1276 (1971). Similarly, the circuit courts other than the Second Circuit have also recognized that busing is a right integral with equal access to an education. In Brown v. Board of Education of City of Bessemer, 464 F.2d 382 (5th Cir. 1972), the court held that busing was required because it was necessary to

implement a court-ordered desegregation plan. In Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153 (5th Cir. 1986), the court held that the school was required to provide transportation for handicapped children to ensure their access to an education. In United States v. School District 151 of Cook County, 404 F.2d 1125 (7th Cir. 1968), the court held that district courts may consider problems related to school transportation to achieve a system of determining admission to schools to all students regardless of their race. In United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966), the court acknowledged that lack of access to school bus transportation would deprive the students of an education and directed the school district to make arrangements to provide transportation, as follows:

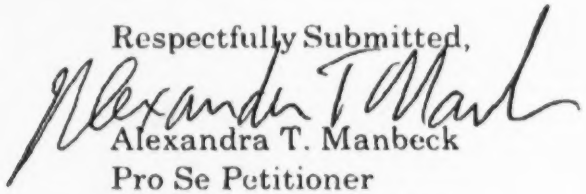
> Where transportation is generally provided, buses must be routed to the maximum extent feasible in light of the geographic distribution of students, so as to serve each student choosing any school in the system. Every student choosing either the formerly white or formerly Negro school nearest his residence must be transported to the school to where he is assigned under these provisions, whether or not it is his first choice, if that school is sufficiently distant from his home to make him eligible for transportation under generally applicable transportation rules.

In all cases involving equal access to an education, the courts of other circuits have unanimously mandated that school bus transportation be provided so that the student may receive an education. Washington et al. v. Seattle School District No. 1, et al., 102 S.Ct. 3187, 458 U.S. 457 (1982); Watson et al. v. City of Memphis, 83 S.Ct. 1314, 373 U.S. 526 (1963). It follows that since the school district has been providing transportation to all kindergarten students in this district, its refusal to provide transportation to petitioner deprives her of the fundamental Fourteenth Amendment property interest without due process. Brown v. Board of Education, 347 U.S. 483, 493, 74 S.Ct. 686, 691 (1953).

CONCLUSION

The split among the circuits that have ruled on whether busing is a protected interest requires resolution, aside from the Second Circuit's drastic departure from this Court's recent ruling in Parent Involved In Community Schools v. Seattle School Dist. No. 1 For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully Submitted,



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APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED FEBRUARY 11, 2008.

Courtney MANBECK, individually and on behalf of all others similarly situated,
Plaintiff-Appellant,
v.
KATONAH-LEWISBORO SCHOOL DISTRICT, Robert Lichtenfeld, school superintendent, individually and in his official capacity, Transportation Department and James Minihan, Transportation Supervisor, individually and in his official capacity,
Defendants-Appellees.
No. 06-3052-CV.

Feb. 11, 2008.

Appeal from an order of the United States District Court for the Southern District of New York (**Conner**, J.).

Alexandra T. Manbeck, Cross River, NY, for Appellant.
Daniel L. Adams, Rutherford & Christie, LLP, New York, NY, for Appellee.

Present **ROSEMARY S. POOLER**, **DEBRA ANN LIVINGSTON**, Circuit Judges, and LEWIS A. KAPLAN,[FN1] District Judge.

> **FN1.** Hon. Lewis A. Kaplan, of the United States District Court for the Southern District of New York, sitting by designation.

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Plaintiff appeals from an order of the United States District Court for the Southern District of New York (Conner, *J.*) granting defendants' motion to dismiss under **Fed.R.Civ.P. 12(b)(6)**. We assume the parties' familiarity with the facts, proceedings below, and specification of issues for review.

At the time suit was filed, plaintiff was not entitled to a public education as a property interest protected by the Due Process Clause, *see* ***Goss v. Lopez*, 419 U.S. 565, 574 (1975)**, because

her fifth birthday was after December 1, 2005. Property interests protected by procedural due process "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."***Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)**. To determine whether a person has a legitimate claim to a benefit, "we look to the statutes and regulations governing the distribution of benefits."***Kapps v. Wing*, 404 F.3d 105, 113 (2d Cir.2005)**. The pertinent statute provides that school boards are not required "to admit a child who becomes five years of age after the school year has commenced unless his birthday occurs on or before the first of December."**N.Y. Educ. Law § 3202**(1). To the extent that plaintiff continues to press a substantive due process claim, we note that "[t]he Fourteenth Amendment does not protect a public education as a substantive fundamental right."***Handberry v. Thompson*, 446 F.3d 335, 352 (2d Cir.2006)**.

New York Education Law § 3202(1) is consistent with the Equal Protection Clause, which does not require classes of people that are "different in fact or opinion to be treated in law as though they were the same."***Plyler v. Doe*, 457 U.S. 202, 216 (1982)** (quoting ***Tigner v. Texas*,**

310 U.S. 141, 147 (1940)) (internal quotation mark omitted). In considering the New York State Legislature's decision to set December 1 as the cutoff date for kindergarten admission, we are mindful that "[a] legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill." *Id.* Moreover, defendants' refusal to provide plaintiff with public transportation to the private school at which she attended kindergarten did not violate the Equal Protection Clause. The Legislature has rationally determined that, although a school district in New York must provide transportation "for all the children residing within the school district to and from the school they legally attend, who are in need of such transportation because of the remoteness of the school to the child or for the promotion of the best interest of such children," **N.Y. Educ. Law § 3635**(1)(a), it has no obligation to transport a child "who is younger than the age of entrance into the public schools established by the school district in which that child resides," **N.Y. Comp.Codes R. & Regs. tit. 8, § 125.9**.

*2 We have considered plaintiff's remaining contentions and found them to be without merit.

For the foregoing reasons, we AFFIRM the district court's judgment.

C.A.2 (N.Y.),2008.
Manbeck v. Katonah-Lewisboro School Dist.
Slip Copy, 2008 WL 376385 (C.A.2 (N.Y.))

APPENDIX B - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Courtney MANBECK, individually and on behalf of all others similarly situated, Plaintiff,
v.
KATONAH-LEWISBORO SCHOOL DISTRICT, Robert Lichtenfeld, School Superintendent, individually and in his official capacity, Transportation Department, and James Minihan, Transportation Supervisor, individually and in his official capacity, Defendants.
No. 05 Civ. 8017(WCC).

June 7, 2006.

WILLIAM C. CONNER, Senior District Judge. This § 1983 action was brought on behalf of **Courtney Manbeck** ("Courtney" or "plaintiff") and all others similarly situated, against defendants Katonah-Lewisboro School District (the "District"), Robert Lichtenfeld, the District superintendent, and James Minihan, the District transportation supervisor. Plaintiff claims that defendants violated her due process and equal

protection rights under the Fifth and Fourteenth Amendments by denying her bus transportation to a private kindergarten because she did not meet the age requirement for transportation established by the District. Plaintiff filed a motion for a temporary restraining order and a preliminary injunction on October 14, 2005. Oral argument was heard before this Court on November 9, 2005. By Opinion and Order dated November 22, 2005, plaintiff's motion was denied. Defendants then sought to dismiss the Complaint under **FED. R. CIV. P. 12(b)(6)** for failure to state a claim. Plaintiff thereafter amended her Complaint to allege that **New York Education Law § 3202** is unconstitutional and to modify the class of plaintiffs in this action to include students in other school districts that interpret **§ 3202** in the same manner as the District. As an answer had not been served at that time, plaintiff was permitted to amend her Complaint subject to defendants' outstanding motion to dismiss. The Amended Complaint adds as defendants all other similarly situated school districts in New York State.[FN1] For the foregoing reasons, defendants' motion is granted.

FN1. The New York State Attorney General's Office was informed of the Amended Complaint and permitted to intervene pursuant to **28 U.S.C. § 2403(b)**. They declined to do so.

BACKGROUND

The facts of this case are set forth extensively in our previous opinion, familiarity with which is presumed. *See* ***Manbeck v. Katonah-Lewisboro Sch. Dist.*****, 403 F.Supp.2d 281 (S.D.N.Y.2005)**.

DISCUSSION

I. *Standard of Review*

On a motion to dismiss pursuant to **Rule 12(b)(6)**, a court must accept as true all of the well pleaded facts and consider those facts in the light most favorable to the plaintiff. *See* ***Scheuer v. Rhodes*****, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)**, *overruled on other grounds,* ***Davis v. Scherer*****, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984)**; ***Hertz Corp. v. City of New York*****, 1 F.3d 121, 125 (2d Cir.1993)**; ***In re AES Corp. Sec. Litig.*****, 825 F.Supp. 578, 583 (S.D.N.Y.1993)** (Conner, J.). The complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief." ***Swierkiewicz v. Sorema N.A.*****, 534 U.S. 506, 512, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002)**. Furthermore, in assessing the legal sufficiency of a claim, the court may consider only the facts alleged in the complaint and any

document attached as an exhibit to the complaint or incorporated in it by reference. *See* **FED. R. CIV. P. 10(c)**; ***Dangler v. N.Y. City Off Track Betting Corp.*, 193 F.3d 130, 138 (2d Cir.1999)** (citations omitted); ***De Jesus v. Sears, Roebuck & Co., Inc.*, 87 F.3d 65, 69 (2d Cir.1996)**.

***276** On a motion to dismiss pursuant to **Rule 12(b)(6) of the Federal Rules of Civil Procedure**, the issue is "whether the claimant is entitled to offer evidence to support the claims." ***Scheuer*, 416 U.S. at 236, 94 S.Ct. 1683**. A complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." ***Padavan v. United States*, 82 F.3d 23, 26 (2d Cir.1996)** (quoting ***Hughes v. Rowe*, 449 U.S. 5, 10, 101 S.Ct. 173, 66 L.Ed.2d 163(1980)**). Generally, "[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.34[1][b] (3d ed.1997); *see also* ***Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1088 (2d Cir.1995)**. Allegations that are so conclusory that they fail to give notice of the basic events and circumstances of which plaintiff describes are insufficient as a matter of law. *See* ***Martin v. New York State Dep't of Mental Hygiene*, 588 F.2d 371, 372 (2d Cir.1978)**.

II. Fifth Amendment Claim

[1] Insofar as plaintiff claims a violation of her Fifth Amendment rights, that claim must be dismissed as plaintiff has "not named the United States government or any agency or employee thereof as a defendant in this matter." *See* ***Cassidy v. Scoppetta*, 365 F.Supp.2d 283, 286 (E.D.N.Y.2005)**. The Fifth Amendment "'governs the conduct of the federal government and federal employees, and does not regulate the activities of state officials or state actors.' "*Id.* (quoting ***Dawkins v. City of Utica*, No. 93-CV-373, 1997 WL 176328, at *4 (N.D.N.Y. Apr.4, 1997)** (emphasis in original) (internal citations and quotation marks omitted)).

III. Fourteenth Amendment Claims[FN2]

> **FN2.** To the extent plaintiff attempts to assert that her substantive Due Process rights were violated, her claims would fail. While the Supreme Court has recognized the protection of fundamental rights under the Fourteenth Amendment in the context of substantive due process and equal protection, it is well established, however, that there is no fundamental right to

education. *See e.g.*, ***Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458, 108 S.Ct. 2481, 101 L.Ed.2d 399 (1988)**. Therefore, plaintiff cannot demonstrate a fundamental right under either substantive due process or equal protection. *See* ***Mazevski v. Horseheads Cent. Sch. Dist.*, 950 F.Supp. 69, 70 (W.D.N.Y.1997)**.

A. ***Procedural Due Process***

[2][3][4] "A two-prong test applies to analyze procedural due process claims. First, the threshold issue is always whether the plaintiff has a property or liberty interest protected by the Constitution. Second, if a protected interest is identified, a court must then consider whether the government deprived the plaintiff of that interest without due process." ***Henderson v. New York*, 423 F.Supp.2d 129, 145 (S.D.N.Y.2006)** (internal quotations omitted). The Due Process Clause of the Fourteenth Amendment protects an individual's property interests. *See* ***Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)**. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* The Constitution does not create property interests,

"[r]ather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.*

[5] Plaintiff asserts that she has a property interest in public education. In *277 support of this assertion plaintiff directs this Court to **Article XI, § 1 of the New York State Constitution** and **§ 3202 of the New York State Education Law**. The New York State Constitution provides that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." N.Y. CONST. art. XI, **§ 1**. **Section 3202(1) of the New York Education Law** states, "[a] person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition." However, that same section explicitly states, "[n]othing herein contained shall, however, require a board of education to admit a child who becomes five years of age after the school year has commenced unless his birthday occurs on or before the first of December." **N.Y. EDUC. L. § 3202**(1). Courtney turned five on December 11, 2005, after the 2005-06 school year commenced and after the December 1 deadline. She therefore is not yet entitled to free public education and therefore does not have a protected

property interest under New York State law.[FN3] As we stated in our prior opinion, plaintiff does not have a property interest in public transportation to her private kindergarten. *See* ***Manbeck*, 403 F.Supp.2d at 284-87**. Since plaintiff does not have a protected property interest, we need not consider whether she was denied due process.

> **FN3.** Plaintiff, relying on ***Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)**, asserts that the District's policy results in a 365-day suspension from public education. (Pl. Suppl. Mem. Opp. Mot. Dismiss at 4.) However, in that case, the students had a property interest in public education as defined by Ohio statute. Here, as discussed, Courtney does not have such an interest. Therefore, that case is inapposite.

B. *Equal Protection*

[6][7][8] The Supreme Court has held that an individual may raise an equal protection claim alleging that he or she has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." ***Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145**

L.Ed.2d 1060 (2000). However, "the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). The determination of what is "different" and what is "the same" lies with the state legislature. *Id.* In this respect, the Supreme Court has stated that the legislature must be afforded *"substantial* latitude to establish the classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill." *Id.* (emphasis added). "In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose." *Id.* Under this review, "a statute is presumed constitutional, and '[t] he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.' "*Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973)).

Plaintiff asserts that because she was born in December 2000, she has been denied the right to a kindergarten education and bus transportation

to an alternate private school unlike those children born between*278 January 1, 2000 and November 30, 2000. Plaintiff attempts to overcome the statute's presumed constitutionality by arguing that other districts in New York, namely the New York City School District, Yonkers School District and Somers School District, admit into kindergarten those students attaining five years of age between December 1 and December 31. In light of this, plaintiff argues that there can be no rational basis for the District to use the earlier December 1 date because other districts and private schools use the later date without any serious consequences.

[9] Plaintiff has not succeeded in rebutting the statute's presumed constitutionality by merely pointing out different age-based admissions deadlines among school districts. The defendants need not " 'actually articulate at any time the purpose or rationale supporting its classification.' "*Heller*, 509 U.S. at 320, 113 S.Ct. 2637 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992)). Indeed, the legislature is under no obligation to produce evidence to sustain the rational or purpose of a statutory classification. *See id.* at 320,113 S.Ct. 2637 (citing *F.C.C. v. Beach Commc'ns*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)). Moreover, the classifications created by the age cut-off "must be upheld against an equal protection challenge if there is any reasonably

conceivable state of facts that could provide a rational basis for the classification." ***Id.* at 320,113 S.Ct. 2637**.

As already indicated, **New York State Education Law § 3202** articulates the standard for those who are entitled to free appropriate public education. The statute explicitly states that it does not require a district to admit a child who turns five after the school year begins *unless* the child turns five *before* December 1. The New York State Legislature, under Article 8 of N.Y.C.R.R. § 125.9, has determined that the age of attendance shall be determined by the district in which the student resides. Therefore, the Legislature has left to the discretion of the districts when, either on or after December 1, they will establish the admission deadline for kindergarten.

Even if we were to find that plaintiff has presented sufficient evidence to rebut the presumption of constitutionality, which she has not, defendants have demonstrated a rational basis for the age distinctions. *See, e.g.*, ***Lewitas v. Ossining Union Free Sch. Dist.*, 10 Misc.3d 1059, 809 N.Y.S.2d 482 (N.Y. Sup.Ct. Westchester Cty.2005)**; ***Isquith v. Levitt*, 137 N.Y.S.2d 493 (Sup.Ct. Kings Cty.1954)**. In consideration of the substantial deference afforded to legislative statutes and decisions, we find that the administrative and educational

interests served by the age distinction provide a rational basis. Administratively, the state and various school districts must set an age cut-off date, and any date will inevitably create distinctions and classifications. However, these classifications are necessary to address legitimate educational concerns presented by children below the age of admission as they may perform at lower levels and thereby slow classroom proceedings or affect the safety of transportation. The classification defendants have established, at the least, "roughly approximate[s] the nature of the problem perceived." ***Plyler*, 457 U.S. at 216, 102 S.Ct. 2382**. Without such specific mandates, each child's request to attend public school and/or receive bus transportation would have to be reviewed on a case-by-case basis. These broader provisions "account for limitations on the practical ability of the State to remedy every ill." *Id.* The distinction may also be in place to permit the District to delay the costs of educating ***279** and transporting these children for a year. The District is in the best position to determine its budgetary considerations, and its determination to allocate its funds in this manner is rational. The Court holds that the age distinctions created by New York Education Law § 2302 and **8 N.Y.C.R.R. § 125.9** serve important administrative, educational and financial interests and thus do not violate the equal protection clause of the Fourteenth Amendment.

IV. *Claims Under the Civil Rights Act*

The Amended Complaint, in addition to alleging causes of action based on violations of the Fifth and Fourteenth Amendments, also alleges causes of actions under 42 U.S.C. §§ 1981, 1983 and 1985.

[10]Section 1983 prevents a person "who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws...."42 U.S.C. § 1983. "The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.' "*Baker v. McCollan*, 443 U.S. 137, 140, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). "It is axiomatic that a successful § 1983 claim requires more than a showing that one has been wronged at the hands of a state or municipal official. Rather, a plaintiff must allege that he has been deprived of some right secured by federal statute or the United States Constitution." *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 249 (2d Cir.1985). As stated above, plaintiff cannot demonstrate that she was denied a right secured under the Constitution. Therefore, her § 1983

claim must fail. *See* ***Baker*, 443 U.S. at 146-47, 99 S.Ct. 2689** (holding that "[h]aving been deprived of no rights secured under the United States Constitution, respondent had no claim cognizable under **§ 1983**").

[11]Section 1981 "prohibits discrimination that infects the legal process in ways that prevent one from enforcing contract rights, by reason of his or her race, [and it] covers ... efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations." ***Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir.1993)**. A **§ 1981** claim requires plaintiff to allege: (1) that he is a member of a racial minority; (2) that defendants had an intent to discriminate against him on the basis of race; and (3) that the discrimination concerned one or more of the activities enumerated in the statute, namely to make and enforce contracts, sue and be sued, give evidence, etc. *See id.* To survive a motion to dismiss, plaintiff's complaint must assert "that the defendant[s'] acts were purposefully discriminatory ... and racially motivated." ***Albert v. Carovano*, 851 F.2d 561, 571-72 (2d Cir.1988)** (en banc). The Amended Complaint is devoid of any assertions regarding racial discrimination. Indeed, the Amended Complaint fails even to mention plaintiff's race. Accordingly, no **§ 1981** action can stand.

[12][13] For similar reasons, plaintiff's § 1985 cause of action also is defective. Narrower in scope than § 1983, *see* ***Blankman v. County of Nassau***, 819 F.Supp. 198, 205 (E.D.N.Y.1993), under § 1985(3)[FN4]*280 a plaintiff must plead " '(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right of the citizens of the United States.' "***Fox v. City of New York***, No. 03 Civ. 2268, 2004 WL 856299, at *9 (S.D.N.Y. Apr. 20, 2004) (quoting ***Mian***, 7 F.3d at 1087-88). "Furthermore, the conspiracy must also be motivated by 'some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action.' "***Mian***, 7 F.3d at 1088 (quoting ***United Bhd. of Carpenters, Local 610 v. Scott***, 463 U.S. 825, 829, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983)). "A plaintiff states a viable cause of action under § 1985 [excepting clause 1 of § 1985(2)] only by alleging a deprivation of his rights on account of his membership in a particular class of individuals." ***Zemsky v. City of New York***, 821 F.2d 148, 151 (2d Cir.1987) (modification in original). Here, plaintiff asserts that she was deprived of education and transportation based on her membership in a class of plaintiffs born in December of each year. However, as discussed, plaintiff cannot demonstrate that she was

deprived of a right secured by statute or the Constitution. Although plaintiff alleges that the defendants conspired to deny her education, she has failed to allege an improper motivation for such a conspiracy. Therefore, plaintiff's **§ 1985** claim must fail.

> **FN4.** The other sections of 1985 are irrelevant to this case. **Section 1** addresses conspiracies to interfere with civil rights by preventing an officer from performing his duties and section 2 addresses obstructing justice through intimidation of a party, witness or juror.

CONCLUSION

For all of the foregoing reasons, the motion of defendants Katonah-Lewisboro School District, Robert Lichtenfeld, and James Minihan is granted, and the action is dismissed in its entirety with prejudice.

SO ORDERED.

S.D.N.Y.,2006.
Manbeck v. Katonah-Lewisboro School Dist.
435 F.Supp.2d 273, 211 Ed. Law Rep. 165

APPENDIX C - NEW YORK EDUCATION LAW

§ 3202. Public schools free to resident pupils; tuition from nonresident pupils

1. A person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition. Provided further that such person may continue to attend the public school in such district in the same manner, if temporarily residing outside the boundaries of the district when relocation to such temporary residence is a consequence of such person's parent or person in parental relationship being called to active military duty, other than training. Notwithstanding any other provision of law to the contrary, the school district shall not be required to provide transportation between a temporary residence located outside of the school district and the school the child attends. A veteran of any age who shall have served as a member of the armed forces of the United States and who shall have been discharged therefrom under conditions other than dishonorable, may attend any of the public schools of the state upon conditions prescribed by the board of education, and such veterans shall be included in the pupil count for state aid purposes. A nonveteran under twenty-one years of age who has received a high school diploma shall be permitted to attend classes in the schools of the district in which such person resides or in a school of a board of cooperative educational services

upon payment of tuition under such terms and conditions as shall be established in regulations promulgated by the commissioner; provided, however, that a school district may waive the payment of tuition for such nonveteran, but in any case such a nonveteran who has received a high school diploma shall not be counted for any state aid purposes. Nothing herein contained shall, however, require a board of education to admit a child who becomes five years of age after the school year has commenced unless his birthday occurs on or before the first of December.

APPENDIX D - NEW YORK EDUCATION LAW
§ 3635. Transportation

1. a. Sufficient transportation facilities (including the operation and maintenance of motor vehicles) shall be provided by the school district for all the children residing within the school district to and from the school they legally attend, who are in need of such transportation because of the remoteness of the school to the child or for the promotion of the best interest of such children. Such transportation shall be provided for all children attending grades kindergarten through eight who live more than two miles from the school which they legally attend and for all children attending grades nine through twelve who live more than three miles from the school which they legally attend and shall be provided for each such child up to a distance of fifteen miles, the distances in each case being measured by the nearest available route from home to school. The cost of providing such transportation between two or three miles, as the case may be, and fifteen miles shall be considered for the purposes of this chapter to be a charge upon the district and an ordinary contingent expense of the district. Transportation for a lesser distance than two miles in the case of children attending grades kindergarten through eight or three miles in the case of children attending grades nine through twelve and for a greater distance than fifteen miles may be provided by the district, and, if provided, shall be offered equally to all children in like circumstances

residing in the district; provided, however, that this requirement shall not apply to transportation offered pursuant to **section thirty-six hundred thirty-five-b** of this article.

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(1)

No. 08-116

Supreme Court, U.S.
FILED
AUG 27 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

COURTNEY MANBECK, *et al.*,

Petitioners,

v.

KATONAH-LEWISBORO SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the District Court's decision to dismiss petitioners' Amended Complaint, with prejudice, pursuant to Rule 12(b)(6) on the grounds that petitioners failed to state a claim for which relief can be granted against the respondents under the Fifth and the Fourteenth Amendments, as well as 42 U.S.C. §§ 1981, 1983 and 1985?

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PROCEDURAL HISTORY

Petitioners filed a class action suit in the United States District Court for the Southern District of New York on behalf of all similarly situated December born children in New York that were denied kindergarten admission in school districts that applied a December 1 cut-off date. The suit alleges that New York Education Law § 3202 violated petitioners' rights to Due Process and Equal Protection under the Fourteenth Amendment. Petitioners' Amended Complaint also alleged violations under 42 U.S.C. §§ 1981, 1983 and 1985. In addition, petitioners also sought to command public school officials to provide transportation to those children born after the December 1 cut-off date who attend private school. Respondents moved to dismiss this case pursuant to Rule 12(b)(6) on the grounds that petitioner was not denied a property interest either in public school enrollment or in transportation to a private school. Furthermore, respondents argued that petitioner was not denied equal protection of the law and her substantive due process rights were not violated because the relevant statutes, regulations and policies are rational. The District Court granted the respondents' motion and dismissed the action in its entirety, with prejudice, on the grounds that petitioner did not have a legitimate property interest, as asserted in her moving papers, to attend kindergarten because she did not reach the required age of attendance on or before December 1. The court held that without such a property interest, petitioner had not been denied due process. Furthermore, petitioner was not denied equal protection of the law in that a rational basis exists for excluding

children born after the December 1 cut-off date because admitting these children would put a burden on the progress of other students in the class, as well as increase transportation costs for the District. Finally, the court held that petitioner failed to demonstrate that she was deprived of a right secured by the Constitution and that a conspiracy to deny her right to attend kindergarten at a public school existed. In a Summary Order, the Court of Appeals for the Second Circuit affirmed the District Court's decision holding that property interests protected by procedural due process are not created by the United States Constitution and the courts will defer to the State statutes and regulations to determine if there is a benefit. Therefore, public education is not a fundamental right. Furthermore, the lower court held that the statutes and regulations set forth by the State of New York were rational.

STATEMENT OF FACTS

In March, 2005, petitioner Courtney Manbeck (hereinafter "Petitioner") sought admission to kindergarten at Increase Miller Elementary School, a public school located within the Katonah-Lewisboro School District (hereinafter "District"), wherein petitioner resides with her parents.

Petitioner was born on December 11, 2000. Pursuant to New York Education Law § 3202 ("Section 3202"), a person over the age of five and under the age of twenty-one who does not possess a high school diploma is entitled to attend public school in the school district in which they reside free of charge. Furthermore, to be eligible to attend, the child must reach five years of age

by December 1 of the year in which they seek admission into public school. Since petitioner was born ten days after the statutory cut-off date, she was not eligible for kindergarten enrollment in the year 2000 and was denied admission. In May, 2005, petitioner's parents enrolled her at the Melrose School, a private educational institution, also located within the Katonah-Lewisboro School District.

Petitioner's parents also enrolled petitioner's school-aged sister, Lara, at the Melrose School in May, 2005. Thereafter, petitioner's parents requested bus transportation for Courtney and Lara Manbeck. Pursuant to New York Education Law § 3635 ("Section 3635"), transportation is provided for all children attending grades kindergarten through eight who live more than two miles from the school in which they legally attend. The District agreed to transport Lara to the Melrose School, however, they denied transportation to petitioner based on the fact that under Section 3202, she was not legally attending kindergarten.

REASONS FOR DENYING THE PETITION

The Court of Appeals correctly affirmed the District Court's decision. Petitioners repeatedly misrepresent the reasons the District Court dismissed petitioners' Complaint. Throughout their current petition, petitioners base their argument on the premise that kindergarten education is a property interest and that being denied admission, despite the fact that petitioner reached age five after the December 1 cut-off date in the district in which they reside, violated petitioner's Equal Protection and Due Process rights. As the Court

held in *Board of Regents v. Roth* , 92 S. Ct. 2701 (1972), "Property interests . . . are not created by the Constitution." Instead, the legislature defers to the individual states to create their own laws. Therefore, to determine whether a property interest exists, the courts will defer to the individual states. Pursuant to the New York State Constitution, Article XI, § 1, "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." Section 3202 further defines who may or may not be admitted to kindergarten in the State of New York: "[n]othing herein contained shall, however, require a board of education to admit a child who becomes five years of age after the school year has commenced unless his birthday occurs on or before the first of December." Moreover, kindergarten education is not mandatory in the State of New York and children under the age of six are not required to attend full time instruction.[1]

Furthermore, petitioners fail to establish that they have a right to district funded transportation. The State statutes provide that any child legally attending kindergarten is eligible for free transportation to their respective school if they are the age in which the district allows a child to legally attend kindergarten. Since the petitioners fell below that legal age if they were born on or after December 1 of the year 2000, they were not eligible for district funded transportation even if they were attending private kindergarten.

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1. Pursuant to New York Education Law § 3205(1)(a): "In each school district of the state, each minor from six to sixteen years of age shall attend upon full time instruction."

In addition, petitioners argue that there is no rational basis for the cut-off date, however, quite the opposite is true. The state set the cut-off date for the benefit of all children in attendance. Younger children may not perform at the level of older children, thus stunting the educational growth of an entire class for the benefit of possibly one student who had not reached five by the December 1 cut-off date. As petitioners state in their petition, there were approximately twenty-five students in the Katonah-Lewisboro School District born after the December 1 cut-off date that may or may not have sought entrance into kindergarten. To provide for transportation and additional school costs for petitioners' to enter kindergarten and receive District funded bus transportation, the District would be forced to reconfigure their budget to fund the added burden of these new students.

Finally, with the exception of a brief footnote in their Appellate Brief [2], petitioners raise for the first time here

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2. Petitioners Appellate Brief Footnote 3: "As a matter of first impression, it seems that "developmental" problems are the main factor to justify discrimination, the districts of the inner cities of Yonkers and New York, both of which are afflicted with numerous social ills of urban life, should lay claim to such problems. The fact that both Yonkers and New York City have adopted the December 31 cutoff date undermines defendants' claim since the all-white suburban children of the Katonah-Lewisboro District could not possibly experience more "developmental" issues than Yonkers' or New York City's children. A more apt comparison between the Districts of Somers and Katonah-Lewisboro, which both have a similar number of kindergarteners (265 in Somers and 285 in Katonah-Lewisboro) and population characteristics equally provides no (Cont'd)

that the application of the statutes in question results in racial discrimination.

I. ISSUES NOT ADDRESSED BY THE LOWER COURTS SHOULD NOT BE ADDRESSED BY THIS COURT FOR THE FIRST TIME ON APPEAL

As discussed *supra*, petitioners raise for the first time in their petition the alleged race-based discrimination created by the law prohibiting admission of children born after December 1 of the year they reach the age of five. This Court has consistently declined to weigh issues not raised or considered by the lower courts. In *Duignan v. United States*, 274 U.S. 195 (1927), the Court refused to hear a challenge to the equity jurisdiction of the Court raised for the first time before the Court. The Court noted, "[t]his Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Id.* at 200. Similarly, in *Neely v. Martin K. Eby Construction Co., Inc.*, 368 U.S. 1027 (1967), petitioner raised an issue not addressed by the Court of Appeals or raised in her petition for a writ of certiorari. The Court stated, "we see no cause for deviating from our normal policy of not considering issues which have not been presented to the Court of Appeals . . ." *Id* at 1081. *See also Cooper Industries,*

(Cont'd)

factual support for the School District's "developmental" claim as the Somers Central School District has been admitting all December-born children in its kindergarten classes without any reported problems.

Inc. v. Avial Services, Inc., 543 U.S. 157 (2004) and *Exxon Shipping Company, et al. v. Baker*, 128 S.Ct. 2605 (2008). Although the Court has previously examined issues not raised below, such questions must present unusual circumstances and be of vital importance. *See Taylor v. Freeland & Kronz et al.*, 503 U.S 638 (1992) Citing *Berkemer v. McCarty*, 468 U.S. 420 (1984). The new questions raised by petitioners do not present unusual circumstances, since school districts across the country have their own age cut-offs. In addition, the questions raised by petitioners are not of vital importance in that none of their fundamental rights were violated. The petition for a writ should, therefore, be denied.

II. THE LOWER COURT CORRECTLY DISMISSED PETITIONERS' FOURTEENTH AMENDMENT DUE PROCESS CLAIMS

Petitioners failed to show that they have been deprived of any property interest by being prohibited from enrolling in public school or being denied district funded transportation to a private school. Furthermore, petitioners' Due Process and Equal Protection claims were correctly dismissed because the relevant statutes, regulations, and policies creating age-based criteria for enrollment in public schools and transportation by the district to private schools are reasonable, not arbitrary, and satisfy the rational basis test.

A. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' PROCEDURAL DUE PROCESS CLAIMS BECAUSE CHILDREN BORN AFTER DECEMBER 1 OF THE YEAR THEY REACH THE AGE OF FIVE DO NOT HAVE A PROPERTY INTEREST IN ATTENDING PUBLIC SCHOOL OR IN TRANSPORTATION FUNDED BY THE SCHOOL DISTRICT

The Fourteenth Amendment provides protection of property interests once a person has gained such an interest. "[P]roperty interests . . . may take many forms." *Board of Regents v. Roth*, 92 S.Ct. 2701, 2708 (1972). Furthermore, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim to it." *Id.* at 2709. "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.*

> "Although the underlying substantive interest created by an independent source such as state law, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause.

> Resolution of the federal issues begins, however, with a determination of what it is that the state law provides."

Town of Castlerock, Colorado v. Gonzalez, 125 S. Ct. 2796, 2803-4 (citations omitted).

The property interest to a free public school education is created by Article XI, § 1 of the New York State Constitution, which provides that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." It is further defined in Section 3202. According to Section 3202,

> "[a] person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition . . . Nothing herein contained shall, however, require a board of education to admit a child who becomes five years of age after the school year has commenced unless his birthday occurs on or before the first of December."

Petitioner was born on December 11, 2000, eleven days past the December 1 deadline for admission to kindergarten in the Katonah-Lewisboro School District. Pursuant to Section 3202, she was not old enough to attend kindergarten for the 2005/2006 school year. Because she was not old enough to attend kindergarten under New York State law, petitioner did not have a property interest in attending public school in the

Katonah-Lewisboro School District. Since the petitioner had no property interest to attend kindergarten during the 2005/2006 school year, there was no due process violation on respondents' part.

This case is distinguishable from *Goss v. Lopez*, 95 S.Ct. 729 (1975), cited by petitioners. In *Goss*, a pivotal issue in determining whether a property interest existed was whether school attendance was required. As discussed *supra*, pursuant to Section 3205, children are not required to attend full day instruction in school until they are six years of age, thus making kindergarten optional in New York.[3] In the instant case, petitioner had not reached the age where she was required to attend school. Therefore, petitioner did not have a property interest in attending kindergarten during the 2005/2006 school year. Similarly, petitioner did not have a property interest in District funded transportation. According to Section 3635, all children residing in the district in which they legally attend public or private school are entitled to bus transportation, free of charge. Although Section 3202 does not specify age limits for those students attending private school, the New York State legislature, under Article 8 of the New York Compilation of Codes, Rules and Regulations § 125.9 ("NYCRR Section 125.9"), has determined that "A kindergarten shall not admit a child who is younger than the age of entrance into the public schools established by the school district in which that child

3. Forty-four states require kindergarten attendance. States that do not require kindergarten attendance include NewYork; Alaska; Idaho; New Hampshire; North Dakota; and Pennsylvania. *See http://nces.ed.gov/programs/statereform/res_tab10.* asp

resides." The Katonah-Lewisboro School District has adopted the same minimum age requirements set forth in Section 3202. Thus, it follows that children not eligible to legally attend kindergarten are not entitled to free bus transportation from the District in order to attend private school.

The New York State Commissioner of Education has previously denied district funded transportation to a child attending a private school. *Smith v. Amherst*, Decision 13,934 (May 6, 1998). In his decision, the Commissioner states that, "[a]lthough there may be a bus available, [the School District] lacks authority to transport students who are ineligible for transportation, notwithstanding the fact that there may be room on the bus for them." *Id.* Similarly in deciding the same issue in *Knauff v. Board of Education*, 293 N.Y.S.2d 133, (N.Y. Sup., 1968) the court stated that "[w]e find no statute, however, which imposes upon school boards the duty to provide free transportation for any child under five years of age."

In *Appeal of a Preschool Child With A Disability*, Decision No. 15,012 (January 16, 2004), the constitutionality of denying free bus transportation to a disabled child was at issue. The Commissioner described the statutory scheme as follows:

> A board of education's authority to provide transportation is restricted to the limitations set forth in Education Law § 3635. Section 3635(1)(e) authorizes, but does not require, a board of education at its discretion, to provide transportation under specified

> circumstances to any child attending grades kindergarten through eight between the school such child legally attends and the childcare locations, including daycare centers. However, **the statute does not provide a board of education with authority, even discretionary, to provide transportation to a child of less than school age, except in the limited circumstances where such child is accompanying a parent who is under 21 years of age to and from such parent's school** (see Education Law § 3635(1)(f)).

Appeal of a Preschool Child With a Disability, Decision No. 15, 012 (citations omitted) (emphasis added). *Accord Appeal of Wheelwright*, Decision 14, 744 (June 19, 2002).

The New York State Constitution provides the right to a free public education and New York statutory law mandates that a child between six to sixteen years of age attend full-time instruction pursuant to Section 3205. In addition, the State confines the property interest of free education to those students who reach the age of five before December 1 of the year in which they seek admission. The concurrent right to transportation is similarly limited by age. At the time petitioner sought admittance, petitioner had not reached the age to legally attend school in the District, therefore, she had no property interest in attending public school or receiving District funded transportation. Without such property interest, petitioners due process rights were not violated and her claims were properly dismissed. The current petition for a writ of certiorari should, therefore, de denied.

B. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIMS

Upon review of Sections 3202 and 3635, as well as NYCRR Section 125.9, petitioners fail to show that any fundamental right is at stake. Therefore, the statutes and regulations in question are subject to minimal scrutiny utilizing the rational basis test. Where no fundamental rights are involved, a government action will be upheld if it is rationally related to a legitimate government purpose. Education is not a fundamental right secured by the United States Constitution. *Board of Regents v. Roth*, 408 U.S. 564 (1972). Thus, the State of New York's Constitution, statutes and policies, as they pertain to education, do not trigger property rights and are subject to mere rational basis review.

Even assuming a right to education was granted by the United States Constitution, it does not follow that it is a fundamental right. As noted *supra*, Article XI, § 1 of the New York State Constitution states, the legislature, "shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." Although the legislature grants the right to free education to children who reside in the state, "children" is not defined. Section 3202 provides a bright line rule where the State Constitution is silent and defines "children" as those over five years of age on or before December 1 of the year they seek admission to kindergarten. Without such guidelines, any child, regardless of their age, could be admitted to school.

C. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' EQUAL PROTECTION CLAIMS BECAUSE THE AGE DISTINCTIONS CREATED IN THE STATUTES AND REGULATIONS ARE RATIONAL

To raise and succeed on an Equal Protection claim, petitioners must establish that they have been "intentionally treated differently than those similarly situated." *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). State Legislatures are granted "substantial latitude to establish the classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and account for limitations on the practical ability of the State to remedy every ill." *Plyer v. Doe*, 457 U.S. 202 (1982). The rational basis test is applied where non-suspect classes are at issue. Age is not a suspect class. As set forth in *Jaffee v. Society of New York Hospital*, 1999 WL 24747 (S.D.N.Y. 1999):

> [C]ourts have applied rational basis scrutiny to classifications based on youth or infancy. *See Douglas v. Hugh A. Stallings, M.D., Inc.* 870 F.2d 1242, 1246 (7th Cir. 1989)(holding that "statutes which classify on the basis of age are subject only to the minimal rational relationship review"); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988) (finding that "[n]o cases have ever held, and we decline to hold, that while the Equal Protections Clause ensures that all persons

> similarly circumstanced shall be treated alike, it does not require classes of people different in fact or opinion to be treated in law as though they were alike. *Plyer v. Doe*, 457 U.S. 202, 217, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982).

Therefore, if there is a conceivable rational basis for a classification, a government action will be upheld. *See e.g. Gregory v. Ashcroft*, 501 U.S. 452 (1991) (holding that a State constitution that required judges to retire at age 70 does not violate the Equal Protection Clause). Further, "a statute is presumed constitutional, and '[t]he burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it.'" *Heller v. Doe*, 509 U.S. 312, 320 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

In *Plyer v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, the Court explained (1982) (emphasis added):

> The Equal Protection Clause directs that all persons similarly circumstanced shall be treated alike. But so too, **the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.** The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications **that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and**

> **private, and that account for limitations on the practical ability of the State to remedy every ill.** In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

Petitioner was four years old and born after December 1 of the year she sought admission to the District's kindergarten. Petitioner is a member of a class that the legislature of the State of New York excluded from public education until the following school year in which she would be five years old. Because she was excluded from legally attending kindergarten, she was also excluded from receiving District funded transportation.

Undoubtedly the New York State legislature has established bright line rules to circumvent issues arising from sending young children to school too early to learn and perform at the level of other students. The legislature has further established this class to accommodate public and private concerns over having to determine on a case by case basis whether a child has reached a developmental stage appropriate for entry into kindergarten. The legislature has further established this class to account for limitations on the State to undertake such a case-by-case review of every child wishing to enter public school regardless of age.

In determining whether the State's establishment of a minimum age requirement for attending public schools is legitimate, the Court need only be assured

that the classification bears some fair relationship to a legitimate public purpose. *See Plyer, supra.* Respondents are not aware of any decision in which a minimum age requirement has been found to violate the Equal Protection Clause.

Petitioners attempt to rebut the presumed constitutionality of the statutory and regulatory scheme fails. First, petitioners argue that the difference in age cut-off requirements among districts is irrational. Not only does petitioners' argument force the conclusion that different requirements equals discriminatory action, it also assumes that there can be no logical reason for the age cut-off. Second, petitioners' argument that the District's financial considerations are meritless because there are only approximately twenty-five additional students in the District seeking bus transportation not only weakens petitioners argument, it strengthens that of the District. If districts that enforce the December 1 cut-off date were required to admit an additional twenty-five students per district that did not previously meet the age requirement, each district's budget would be significantly strained in procuring additional funds for bus service and other materials. Such an action would likely result in budget cuts in other essential areas critical for ensuring the educational success of students already legally attending kindergarten and higher grade levels.

III. THE STATUTES AS THEY STAND DO NOT CREATE RACIAL DIVISION AMONG KINDERGARTEN-AGED STUDENTS

The State legislature has broad discretion to draft and implement statutes and regulations that account for imbalances that may result. The State has given the individual school districts the authority to draft their own rules and procedures for admitting kindergarten students into public school. Although kindergarten is optional in New York, statutes have been enacted detailing those who qualify for admission.

Section 3202 does not invoke a racial classification; rather, it sets an age limitation for admission to kindergarten for all students residing in the State of New York. In New York, students are admitted to public school in the district in which they reside. Districts are established by city or county. There is no evidence that the State drew up districts with the intent to exclude non-minority students from attending kindergarten.

Petitioners' attempt to analogize their case with *Parents Involved in Community Schools v. Seattle School District No.1*, 127 S. Ct. 2738 (2007). The case at bar is vastly different. Unlike the circumstances in *Parents Involved in Community Schools*, where students were assigned to a particular school within the district based on the racial composition of the school, petitioners would not be able to legally attend any school in the Katonah-Lewisboro School District, whether any of the District's schools were predominately minority or non-minority, because they would not have reached the age of five by the December 1 cut-off date.

Furthermore, all students who do reach the age of five before the December 1 cut-off date are admitted to the school within the district closest to their home, without limitation.

In addition, if the State failed to mandate that children be required to attend school in the school district in which they reside, each student would be able to attend public school wherever they like, resulting in chaos in planning bus schedules as well as teaching schedules for those who were legally attending school.

IV. KINDERGARTEN EDUCATION IN NEW YORK IS OPTIONAL, THEREFORE, DENIAL OF ADMISSION DOES NOT RESULT IN A DELAY IN EDUCATION AND DUE PROCESS RIGHTS ARE NOT TRIGGERED

As discussed above, pursuant to Section 3205, children in the State of New York are not required to attend full time instruction until they reach the age of six. In addition, kindergarten is optional in the State of New York. Furthermore, Section 3202 limits admission of children that do not reach the age of five before December 1 of the year they seek admission. The Appellate Division of the State of New York has also addressed this issue as it pertains to petitioners' argument.

The case at bar is analogous to *Frost v. Yerazunis*, 53 A.D.2d 15 (3rd Dept., 1976), in which the plaintiff was born on December 9th of the year he sought admission to kindergarten in a district that applied a December 1 cut-off date. The plaintiff in *Frost* sought a waiver of

the law in an attempt to permit him to attend school before reaching the prescribed age. The court held that the school district was not required to consider students on a case by case basis and that delaying his admission until he was old enough to legally attend did not result in a one year suspension because kindergarten is not required in the State of New York and the plaintiff could enter first grade the following year. The court added that there was no delay in education because the plaintiff attended private kindergarten. Petitioner similarly attended private school before enrolling as a first grade student at Increase Miller Elementary School for the 2006/2007 school year. Therefore, because the petitioner was not subject to a delay in education, her due process rights were not triggered.

V. CIRCUIT SPLITS OVER DEPRIVATION OF PUBLIC TRANSPORTATION AS VIOLATING THE EQUAL PROTECTION CLAUSE HAVE NO RELEVANCE OR BEARING ON THE CASE AT BAR

In her attempt to assert a case of racial discrimination against white minority students residing in the Katonah-Lewisboro School District, petitioner misapplies benchmark cases to establish that each child attending school is entitled to district funded transportation. Petitioner cites *Brown v. Board of Education of City of Bessemer*, 790 F.2d 1153 (1972), *United States v. School District 151 of Cook County*, 404 F.2d 1125 (7th Cir. 1968), and *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986) to establish that she is entitled to bus transportation in the Katonah-

Lewisboro School District. While each case addresses the issue of bus transportation, it is in the context of school desegregation in *Brown* and *United States v. School District 151 of Cook County*, and in the context of bus transportation for handicap children in *Alamo Heights Independent School District*. Therefore, none of the cases petitioners cite are relevant or in any way related to the case herein.

Acknowledging that busing is a right integral with equal access to education for all children legally attending school, petitioners still do not make a compelling argument. As discussed *supra*, Section 3202 provides that all children are permitted to attend public school free of charge, provided that they reach the age of five by the cut-off date in the school district in which the reside and are no older than the age of twenty-one. The Katanoah-Lewisboro School District has a December 1 cut-off date. Section 3635 provides that children attending school in the Katonah-Lewisboro School District, along with every other district in the State, are entitled to district funded bus transportation provided they are legally attending kindergarten. Property interests are not created by the United State Constitution, they are created by the states. To assert a claim of depravation of the right to Due Process and succeed on that claim, an individual must first prove that they have gained a property right and that property right has been violated.

The Katonah-Lewisboro School District provides free transportation to and from school so long as a child is legally attending school. At the time petitioner enrolled in private kindergarten, she was not legally

attending school, in accordance with Section 3202, because she did not reach the age of five before the December 1 cut-off date. Furthermore, petitioner was not legally required to attend kindergarten because kindergarten is optional in the State of New York. NEW YORK EDUC. LAW § 3205(1)(a).

Petitioners argue that the denial of bus transportation to December born students in the Katonah-Lewisboro School District is race-based and, thus, discriminatory. Children legally attend school in the district in which they reside. Because children attend school in the district in which they reside, they are also provided bus service in the district in which they reside. As petitioners assert, the Katonah-Lewisboro School District population is 98% white. The ethnic and racial make-up of the District has no relevance or bearing on the statute itself or the District's decision to denying transportation to the petitioner. The law applies to all school districts in the State of New York, regardless of the racial or ethnic make-up of the district. Petitioners' argument has no merit and the petition must be denied.

CONCLUSION

Petitioners fail to establish that their Due Process rights were violated and that they were denied Equal Protection under the law. The United States Constitution does not grant a property interest in education, rather, the courts will defer to the individual states. The New York State Constitution provides that each child shall receive a free public education, however, the legislature limits the age in which a child is eligible to attend to those who reach the age of five before December 1 of the year in which they seek admission. Due to the limitations created by Section 3202, petitioner does not have a property interest in attending kindergarten because she was not five prior to December 1, 2005. In addition, petitioners have no right to avail themselves of District funded transportation provided to school age children. For the reasons set forth herein, the petition should be denied.

Respectfully submitted,

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